



Agency Innovations in E-Rulemaking

Committee on Rulemaking

Proposed Recommendation | December 8-9, 2011

1 The rulemaking function of federal regulatory agencies is typically accomplished today
2 through “e-rulemaking”: that is, through “the use of digital technologies in the development
3 and implementation of regulations,’ before or during the informal rulemaking process, i.e.,
4 notice-and-comment rulemaking under the Administrative Procedure Act (APA).”¹ The website
5 www.regulations.gov centralizes much e-rulemaking activity throughout the executive branch.
6 This recommendation concerns individual agencies’ uses of their own websites to promote e-
7 rulemaking and other agency initiatives and activities.

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9 The proliferation of competing demands for communication makes rulemaking only
10 one ~~perhaps even to some, a relatively minor one~~ of the many priorities under
11 consideration when agency officials make decisions about the design and functionality of their
12 websites. As a result, there is a risk agencies will make website design decisions without giving
13 due consideration to enhancing public participation in rulemaking through the use of electronic
14 media. Indeed, an emerging approach to government website design focuses on giving
15 prominence to “top tasks” sought by members of the public. However, an exclusive focus on
16 current website use or demand ~~will probably~~ may push information about rulemaking, and
17 online opportunities for public commenting on rulemaking, far into the background—simply
18 because the volume of website traffic generated by online government services performed by
19 many agencies dwarfs the traffic related to rulemaking. Rulemaking may ~~perhaps~~
20 “top task” in terms of the numbers of web users, but in a democracy, few tasks compare in

Comment [E.S.1]: Manager’s Amendment

Comment [E.S.2]: Manager’s Amendment

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¹ Administrative Conference of the United States, Recommendation 2011-1, Legal Considerations in e-Rulemaking 1 (quoting Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process* 2 (2004) (working paper), http://lsr.nellco.org/upenn_wps/108).



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21 significance with the ability of government agencies to create binding law backed up with the
22 threat of civil, and even criminal, penalties.

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24 The Conference studied the websites and e-rulemaking initiatives of 90 agencies, each
25 of which had reported completing an average of two or more rulemakings during each six-
26 month period covered by the semiannual Unified Regulatory Agenda in 2009-2010. The study
27 reveals that individual agencies have used websites in innovative ways to promote e-
28 rulemaking. For example, agencies have developed portions of their own websites to support
29 rulemaking efforts. Some agencies have specialized webpages that allow users to submit and
30 view comments on all of the agency's open rulemakings, or to view information on the status of
31 their priority rulemakings. Links from some agency home pages make rulemaking information
32 easy to locate. Other agencies have innovated by using social media to get the public involved
33 in the rulemaking processes from the earliest stages. These social media tools include blogs,
34 Facebook, Twitter, IdeaScale, and other online discussion platforms.

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36 Agency innovations can improve the availability of information and engage the public in
37 rulemaking activities, often at no great cost to the government. A cost-effective technique to
38 improve the availability of rulemaking information on individual agency websites leverages
39 available centralized data sources. An example of this approach is found on the websites of
40 many members of Congress, who provide a link on their home page to a page listing all the
41 legislation the member sponsors. The list is not drawn from the Member's own database, but
42 rather extracts information from a THOMAS database of all legislation currently pending in
43 Congress. Regulations.gov makes a similar tool available to agencies, thus enabling them to
44 provide easy access to complete and up-to-date rulemaking information without the necessity
45 of maintaining the underlying database.

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47 Agency innovations can also further well-established policies in favor of broadening
48 access by groups that have historically faced barriers to participating effectively in rulemaking.
49 In 2000, President Clinton issued Executive Order 13166 in an effort “to improve access to ...
50 programs and activities for persons who, as a result of national origin, are limited in their
51 English proficiency.”² The Office of Management and Budget’s policy on agency websites
52 reminds agencies that they are “required to provide appropriate access for people with limited
53 English proficiency.”³ Similarly, until high-speed **Internet** access is pervasive across all strata of
54 society, any agency that makes full public access and participation a priority should explore low
55 bandwidth options, while also remembering that some members of the public do not have
56 Internet access at all. In addition, continued vigilance is needed to ensure that agency websites
57 and other electronic media will be as accessible to individuals with disabilities as they are to
58 other users. This accessibility may grow even more challenging in the wake of new techniques
59 for organizing a large volume of information on a website.

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61 Individual agency websites can also be used to address discrete deficiencies in the
62 availability of critical rulemaking information. One such problem is that **many agencies’ policies**
63 **relating to comments**⁴ **policies for many agencies** cannot be found easily by the public. Even on
64 web pages dedicated to the submission of comments, a comment policy is not always visible to
65 the user. A second difficulty arises with old rulemaking materials, which need to be preserved
66 for archival, historical, and legal reasons, but are often difficult for users to find and search. A
67 third issue is that agency websites are uniformly easy to locate, but do not always include

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² Exec. Order No. 13166, 65 Fed. Reg. 50121, 50121 (Aug. 11, 2000).

³ OMB Deputy Director for Management Clay Johnson, Memorandum on Policies for Federal Agency Public Websites (Dec. 17, 2004), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-04.pdf>.

⁴ [See generally Administrative Conference of the United States, Recommendation 2011-2, Rulemaking Comments \(recommending that agencies establish and publish certain policies governing rulemaking comments\).](#) **[Manager’s Amendment]**



68 features to ensure that essential information, particularly about rulemaking, is broadly
69 accessible to the public.

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71 The Conference believes that, as a general matter, agencies should continue to improve
72 their websites to facilitate public accessibility and engagement so as to achieve the promise of
73 e-rulemaking. This ~~re~~ recommendation is intended to broadly encourage agencies to develop
74 and use innovative, cost-effective ways to use individual websites to solve some of the discrete
75 problems identified above and generally engage the public in rulemaking.

Comment [E.S.9]: Manager's Amendment

76 RECOMMENDATION

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78 Increasing the Visibility of Rulemakings

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80 1. Agencies should ~~manage their use of the Internet~~ design and manage their websites with
81 rulemaking participation in mind.

Comment [E.S.10]: Manager's Amendment

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83 2. ~~Each Agency~~ies should provide access to a one-stop location, which should be easily
84 reachable from ~~agencies'~~its home pages, for all ~~of its~~ rulemakings, ~~including those at the~~
85 ~~advanced notice of proposed rulemaking stage and also including proposed nonlegislative rules~~
86 ~~and guidance documents,~~ currently open for comment ~~or which are expected to be open for~~
87 ~~comment in the next [6] months.~~ This may take the form of providing pinpoint links to specific
88 ~~data information~~ about the agency's rulemakings available on websites such as Regulations.gov,
89 RegInfo.gov, Federal Register 2.0, and so forth, which would allow ~~the agency~~ies to efficiently
90 enable the public to retrieve all ~~the available~~ information the federal government has about ~~its~~
91 ongoing rulemakings.

Comment [E.S.11]: Manager's Amendment

Comment [E.S.12]: Herz Amendment 1

Comment [E.S.13]: Herz Amendment 2

Comment [E.S.14]: Manager's Amendment

Comment [E.S.15]: Manager's Amendment

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93 3. Agencies should consider, in appropriate rulemakings, using social media tools to raise
94 the visibility of rulemakings. When an agency sponsors a social media discussion of a
95 rulemaking, it should provide clear notice ~~to participants~~ as to whether and how it will use the
96 discussion in the rulemaking proceeding.

Comment [E.S.17]: Manager's Amendment

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98 **Making Comment Policies Easy to Locate**

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100 4. Agencies should display or link to their comment policies in prominent or multiple
101 locations on their websites.

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103 **Improving Access to Agency Websites**

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105 5. Agencies should ~~strive further~~continue to improve the accessibility of their websites to
106 members of the public.

Comment [E.S.18]: Manager's Amendment

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108 6. Agencies should take steps to improve access for persons who have faced barriers to
109 effectively participating in rulemaking in the past, including non-English speakers, users of low-
110 bandwidth Internet connections, and individuals with disabilities.

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112 **Ensuring Access to ~~Archived Materials from Completed Rulemakings~~ Material**

Comment [E.S.19]: Manager's Amendment

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114 7. Agencies should develop systematic protocols to enable the online storage and retrieval
115 of materials from completed rulemakings. Such protocols shall, to the extent feasible, ensure
116 that website visitors using out-of-date URLs are automatically redirected to the current location
117 of the material sought.

Comment [E.S.20]: Herz Amendment 3

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119 | ~~Periodically Evaluating Agency Use of the Internet in Rulemaking~~~~Evaluating Website~~

120 | ~~Accessibility on an Ongoing Basis~~

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122 | 8. Agencies should periodically evaluate their use of the Internet in rulemaking and should
123 | continue to innovate and experiment with new and cost-effective ways to engage the public in
124 | rulemaking via the Internet.

Comment [E.S.21]: Manager's Amendment